SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 464

CHESTER BOWLES, AS ADMINISTRATOR OF THE OFFICE OF PRICE ADMINISTRATION,

Appellant,

vs.

MRS. KATE C. WILLINGHAM AND J. R. HICKS, JR.

REPLY BRIEF FOR APPELLEES.

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REPLY BRIEF FOR APPELLEES.

This reply brief is filed pursuant to permission granted by the Court at the conclusion of the oral argument.

1. *The District Court, if it had jurisdiction of the case at all, had jurisdiction to determine the constitutionality and validity of the Emergency Price Control Act, Maximum Rent Regulation No. 26, and all contemplated orders thereunder.* (Original Brief, page 7.)

We call attention to the recent case of *Allen Pope* v. *The United States, No. 45704,* decided by the Court of Claims of the United States, January 3, 1944. We refer also to an article which appears in the American Bar Association Journal of January, 1944; Vol. 30, pp. 17. *et seq.*: "Can a Trial Court of the United States be completely deprived of the power to determine Constitutional Questions?"

2. *The rent control sections of the Emergency Price Control Act are unconstitutional and void being violative of Article I, Section 1, of the Constitution of the United States.* (Original Brief, p. 21.)

A careful reading and study of the cases cited by the appellant at page 21 (note 9) of his brief suggests this thought: In that group of cases, of which the *Tagg Brothers* and *Moorehead, Union Bridge Co., Monongahela Bridge Co.* cases are types, the application of legal criterion must have been justified by a prior hearing held upon notice, and the words of the criteria must be construed as if the phrase "as determined by a hearing held under the terms of the statute" modified the particular criterion. For example, in the *Bridge* cases (Appellant's Brief, page 22, note 9), the criterion is "unreasonable obstruction to navigation." But the determinations of the fact that a bridge was an unreasonable obstruction to navigation must have been preceded by a hearing held after notice to the bridge owner.

> "That the Act of 1899 did not invest the Secretary of War with arbitrary power in the premises, since in reference to any bridge alleged to constitute an unreasonable obstruction to navigation he was bound, before making any decision or taking final action, to notify the parties interested of any proposed investigation by him, give them an opportunity to be heard and allow reasonable time to make such alterations as he found to be necessary to free navigation."
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> *Monongahela Bridge Co.* v. *United States*, 216 U. S. at page 193.

In *Mahler* v. *Eby*, 264 U. S. 32, where the standard was "undesirable resident," the Court said at page 40: "Our history (since 1802) has created a common understanding of the words 'undesirable residents' which give them the quality of a recognized standard. In the *Marshall Field* case

(143 U. S. 689) the Court distinctly pointed out, speaking of the Tariff Act under attack, "nothing involving the expediency or the just operation of such legislation was left to the determination of the President" (Cited in *Union Bridge Co.* case, 204 U. S. at p. 382).

> "The true distinction is between the delegation of power to make the law which necessarily involves a discretion as to what it shall be, *and* conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." (Judge Ranney of the Supreme Court of Ohio, quoted by this Court in *Union Bridge Co.* case, 204 U. S. at page 383.)
>
> "It will not be contended that Congress can delegate to the Courts or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself. * * * The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, *from those of less interest*, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."
>
> (Chief Justice Marshall in *Wayman* v. *Southard*, 10 Wheat. 42, 43, 6 L. Ed. 262, 263, 1825.)

You have drawn the line in the *Schechter* case, in the *Ryan* case, as contrasted to the *Rock Royal* case, the *Adkins* case.

You are now called upon again to draw the line; to say that the broad powers conferred upon the Administrator are powers which are strictly and exclusively legislative, powers dealing with a subject of the highest import, which must be regulated by the Congress itself.

3. *The Rent Control sections of the Emergency Price Control Act are unconstitutional and void, being violative*

of the Fifth Amendment to the Constitution of the United States.

(Original Brief, Page 53.)

The appellant says: "With respect to the basic rent regulation itself, there is no constitutional requirement that its issuance be preceded by notice and hearing" (Appellant's Brief, p. 14). For that statement there is cited *Bi-Metallic Co.* v. *Colorado*, 239 U. S. 441, 445. That case is also considered at pages 33 and 34 of Appellant's brief. That case is the answer used by the Emergency Court of Appeals to this attack upon the act. (See *Avant, et al.* v. *Bowles*, Nos. 63 and 64 E. C. A., decided December 31, 1943).

We submit that that case is no answer to the problem raised by this attack upon the statute.

We most respectfully suggest to the Court that the record in that case be carefully examined. We have examined the record as closely as time has permitted and we allude to these two excerpts from that record:

> "Furthermore, the Tax Commission by §15 of the Act is expressly authorized to receive complaints, and carefully examine into all cases, where it is alleged that property subject to taxation, has not been assessed, or has been fraudulently or for any reason improperly assessed, etc. Here is an express provision for an opportunity to be heard which, with the notice given by the statute of time and place of the meeting of the Tax Commission, surely constitute due process of law."
>
> Opinion of White, D. J., at page 62 of transcript *Bi-Metallic* case.

An examination of the brief of counsel for the defendants in the *Bi-Metallic* case will show that their defense and the ultimate decision of the Court rested upon the principle of *Turpin* v. *Lemon*, 187 U. S. 51: "Exactly what due process

of law requires in the assessment and collection of general taxes has never yet been decided by this Court, although we have had frequent occasion to hold that in proceedings for the condemnation of land under the laws of eminent domain, or for the imposition of special taxes for local improvements, notice to the owner at some stage of the proceeding, as well as an opportunity to defend is essential. * * * But laws for the assessment and collection of general taxes stand upon a somewhat different footing and are construed with the utmost liberality, sometimes even to the extent of holding that no notice whatever is necessary. (Cited in brief for Defendant in Error in *Bi-Metallic* case at page 27, thereof.)

We have not a case involving the collection or assessment of general taxes. We have a case where the Congress has sought to authorize an administrator to segregate various areas of the United States from the rest of their country, call them "defense rental areas," and fix their rents all without any notice or hearing prior to the effective date of the regulation.

It seems to us, that we are governed by the rule embraced in the language of the Court in *Embree* v. *Kansas City Road District* (240 U. S. 242): "Where a taxing district is not established by the legislature, but by exercise of delegated authority, there is no legislative decision that its location, boundaries and needs are such that the lands therein are benefited, and it is essential to due process of law that the landowners be accorded an opportunity to be heard on the question of benefits."

In *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, at page 167, the Court said: "The legislature not having itself described the District, has not decided that any particular land would or could possibly be benefited as de-

scribed, and, therefore, it would be necessary to give a hearing at some time to those interested, upon the question of fact whether or not the land or any owner which was intended to be included, would be benefited by the irrigation."

> "*The legislature, when it fixes the district itself,* is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the district, and the citizen has no constitutional right to any other or further hearing upon that question" (Ibid., p. 174).

But:

> "Unless the legislature decides the question of benefits itself, the landowner has the right to be heard upon that question before his property can be taken" (Ibid., p. 175).

See also *Southern Ry. Co.* v. *Virginia*, 290 U. S. 190.

The appellant, we understood, answered this case by saying that it applied only to a few corporations. Is that an answer? The statute (290 U. S. p. 192) applied to every grade crossing in Virginia, and therefore to every railroad company operating in Virginia. Regulation 26 applies to every owner of rental property in the Macon defense rental area—of course, these are more numerous than there are railroads in Virginia but—is that the test? If so, to what number of people must an administrative regulation apply before notice and hearing ceases to be necessary as an attribute of procedural due process?

The appellant says we had notice prior to the issuance of the proposed *order*. That is not the test. The scope of the hearing on the issuance of the "order" would not and could not have embraced the basic questions, but would have simply been an application of the regulation previously issued. The Court will, of course, have noted that the

"procedural regulation" is quite a different document from the "Rent Regulation". The Rent Regulation is the administrator's basic, substantive statute in a defense rental area. The "Procedural Regulation" is his code of procedure under that substantive regulation. The act itself compels him to issue the Rent Regulation in some form if he decrees rent control in a given area. The act does *not* compel him to issue the procedural regulation, and the one exhibited in the appendix to appellant's brief was not issued until January 12, 1943, six months after the issuance of the Rent Regulation. (There was a previous one, but whether in it the administrator deigned to give any kind of a hearing, we do not recall.)

> "If the Statute did not provide for a notice in any form, it is not material that as a matter of grace or favor, notice may have been given of the proposed assessment. It is not what notice uncalled for by the statute, the taxpayer may have received in a particular case that is material but the question is whether any notice is provided for by the Statute."
>
> *Security Trust & Safety Vault Co.* v. *Lexington*, 203 U. S. at p. 33.

During the argument of the *Yakus* and *Rottenberg* cases on January 7th, Mr. Justice Jackson asked counsel for a distinction of the *Falbo* case: (*Nick Falbo* v. *The United States*, decided Jan. 3, 1944, No. 73, Oct. Term, 1943). The great distinction is shown by the following language of Mr. Justice Black at page 3 the pamphlet opinion: "The registrant may contest his classification by a personal appearance before the local board, and if that board refuses to alter the classification by carrying his case to a Board of Appeal, and thence in certain circumstances to the President *only after he has exhausted this procedure is a protesting registrant ordered to report for service.*

Conclusion.

In the argument of the *Rottenberg* and *Yakus* cases we understood the Solicitor General to say that there was no constitutional right to make a profit.

This Court has said as late as 1927 in the case of *Tyson & Brother* v. *Banton*, 273 U. S. 418, 429, "The right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself, and, as such, within the protection of the due process of law clauses of the 5th and 14th Amendments.

There is no provision in this law which provides that the owner may receive a fair return on his property, nor is there any provision in the regulation or procedural regulation authorizing him to petition for an adjustment on this ground.

Block v. *Hirsh*, 256 U. S. 135, the Court by a 5 to 4 decision upheld the District of Columbia rent laws of the last war. But, in that law, by §106 of the act machinery was provided to secure to the landlord a reasonable rent (op. p. 157).

> "The decision would for the first time in our history set aside a delegation of authority to an independent administrative agency" (Appellant's brief, p. 17).

Has there ever in our history been such a sweeping delegation of authority by the Congress to an administrator?

Never before in our history has Congress delegated to a single individual the right to determine, without prior notice or hearing, the particular segment of the United States in which rents should be stabilized or reduced; the right to determine, without prior notice or hearing, the period of the regulation; the right to determine, without prior notice or hearing, the character of the regulation to be imposed; the right to determine, without prior notice or hearing,

rents which may or may not provide a reasonable return to the owner on the value of his property; the right to fix rents which if continued in force may bankrupt property owners in those areas selected by the administrator.

It is an awful responsibility we know, for a Court to set aside an Act of Congress, particularly in time of war. It is almost as great a responsibility for me as a member of the bar of this Court to plead that you do so. Deliberately, we omitted from our brief any reference to those cases which pronounce the doctrine that the mandates of Constitution are to be obeyed in times of war as well as in times of peace. Their principle is fundamental and axiomatic. But when an Act of Congress is sought to be upheld on the ground of "practicability,"—of "feasibility"—we can only reply: (Appellant's Brief, p. 19) Is the test of "Constitutionality" to be swept aside, even in war time, and that of "practicability," of "feasibility" substituted?

Congress *may* regulate rents in times of war. Congress *should* regulate rents in times of war. But, in so doing, Congress should follow the mandates of the Constitution. This Act of Congress expires by limitation of time in a very few months. May you by your opinion in this case let it be known that if rent control is continued, such continuation must be in accordance with a law which embodies the basic principles of constitutional government.

Respectfully submitted,

CHARLES J. BLOCH,
Attorney for Appellees.